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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 498

ADELHEIT VON HARDENBERG, IRMGARD VON ALTEN and IRMGARD VON SCHILLER,

Petitioners,

vs.

ROBERT F. KENNEDY, Attorney General of the United States,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

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Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

Petitioners Adelheit von Hardenberg, Irmgard von Alten and Irmgard von Schiller petition this Court to issue its writ of certiorari to review the judgment of the Supreme Court of Illinois entered in *Eugene Orme, et al.* v. *The Northern Trust Company, et al.*, Nos. 36509, 36510, and 36512, on May 14, 1962, insofar as that judgment held petitioners' property to be subject to and within the purview of a vesting order issued by respondent pursuant to the Trading With the Enemy Act (50 U.S.C. App. §§ 1 *et seq.*)

Opinion Below

The opinion of the Supreme Court of Illinois (R. 14-26*) appears as Appendix A to this Petition, pages App. 1 to App. 17; and is reported at 25 Ill. 2d 151, 183 N.E. 2d 505.

The opinion of the Appellate Court of Illinois, First District, appears as Appendix B to this Petition, pages App. 18 to App. 35, and is reported at 29 Ill. App. 2d 75, 172 N.E. 2d 413.

The Circuit Court of Cook County, Illinois, rendered no opinion in this case. The pertinent portion of its decree is set forth in Appendix D hereto, page App. 37.

Jurisdictional Statement

The opinion and judgments of the Supreme Court of Illinois were filed and entered May 25, 1962. (R. 13, 27-32.) A petition for rehearing (R. 34) was denied July 12, 1962 (R. 35).

On July 14, 1962 the Supreme Court of Illinois entered an order, pursuant to petitioners' motion (R. 36-40), staying the mandate until this Court makes a final disposition of this petition for writ of certiorari, insofar as the mandate affirms that portion of the decree appealed from which directs the trustee to distribute the property here in question to respondent rather than to petitioners (R. 41). This order is set forth in Appendix C, page App. 36.

The jurisdiction of this Court is invoked under Section 1257(3), Title 28, United States Code, providing for review

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* "R....." refers to pages of the certified record of the Supreme Court of Illinois which is on file in this Court. "Pet. A....." refers to pages of the Abstract of Record which petitioners filed in the Supreme Court of Illinois, which is located at page 2 of the certified record. "Res. A....." refers to pages of the Abstract of Record which respondent filed in the Supreme Court of Illinois, which is located at page 6 of the certified record.

by this Court by certiorari of decisions of State courts wherein a title, right or privilege is specially claimed under the Constitution or statutes of the United States.

Questions Presented

1. Does the Attorney General have power under the Trading With the Enemy Act (50 U.S.C. App. §§ 1 *et seq.*) to vest property which was not acquired by German nationals until 1951?

2. Is the Attorney General bound by the announcements made by the heads of our government in 1947 and 1951 that property of German nationals acquired after December 31, 1946 will not be vested under the Trading With the Enemy Act?

3. Is the decision of the court below in conflict with the decision of the Court of Claims in *GMO Niehaus & Co. v. U. S.*, 170 F. Supp. 419 (Ct. Cl., Feb. 11, 1959), and of the Appellate Court of Indiana in *Rogers* v. *Calumet National Bank of Hammond*, 172 N.E. 2d 904 (App. Ct. of Ind., 1961)?

4. For purposes of the Trading With the Enemy Act, did petitioners acquire the property in question after December 31, 1946?

5. Is the prior decision of the Supreme Court of Illinois in this case (*Orme* v. *Northern Trust Co.*, 410 Ill. 354, 102 N.E. 2d 335 (1951), certiorari denied 343 U.S. 921), res judicata or the law of the case on this appeal?

A STATEMENT OF THE CASE.

LOUISA G. BIGELOW'S WILL—1873.

The will of Louisa G. Bigelow (died 1873) established a trust for her three granddaughters, Josephine Caldwell (died 1919), Louise de Haven (died 1941), and Sarah de Haven (died 1951). The trust *res* consisted of valuable real estate located in the heart of the Chicago Loop area, and certain other assets. The will provided (*inter alia*) that the three granddaughters were to receive payments from the income of the trust during their lives, and at the time of the death of the last of the three to die, the corpus of that trust "shall then be divided equally among the children or heirs of my said grandchildren." (Res. A. 36-38.)

Petitioners Adelheit von Hardenberg and Irmgard von Alten* are the only issue of Louise de Haven, the second to die of the testatrix' three granddaughters. (Pet. A. 13-14.) These two old ladies are citizens and residents of Germany. (Pet. A. 18-19.) Their mother, Louise de Haven, was a native and citizen of the United States and lived here from the end of World War I until her death in 1941.

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*During the proceedings in the Circuit Court, Adelheidt von Hardenberg was sometimes referred to as Adelheidt (Adelaide) Augusta Nina Edwin (von Alten) von Hardenberg, or combinations of those names. Irmgard von Alten was sometimes referred to as Erma (Irmgard) Stella (von Alten) von Wengersky. Throughout this petition we use the shortened names shown above.

ORME'S ACTION—1943.

In 1943 plaintiff Eugene Orme brought this action to construe the will of Louisa G. Bigelow. Orme claimed that he, and not petitioners Adelheit von Hardenburg and Irmgard von Alten, was entitled to one-third of the trust created by Louisa Bigelow's will. Orme based his claim on construction of the Bigelow will coupled with application of Shelley's Rule, which he asserted gave Louise de Haven a fee in one-third of the trust corpus. He then contended that the alleged fee interest was bequeathed to him in the will of Louise de Haven. Petitioners, together with other descendants of Louisa G. Bigelow, were joined as parties defendant. (Pet. A. 4; Res. A. 8-13.)

COUNSEL FOR PETITIONERS APPEAR AND DEFEND—1945.

Irmgard von Schiller* is the daughter of petitioner von Alten and the niece of petitioner von Hardenberg. When Orme's action was filed, Mrs. von Schiller was living in Rio de Janiero, Brazil, and could not communicate with her mother and her aunt because of the war. Acting under a power of attorney given to her by her mother and aunt, she retained counsel to defend the *Orme* case. (Pet. A. 18-19.) In 1945, petitioner's counsel filed an appearance and an answer to Orme's complaint and amended complaint, asserting the rights and position of Mrs. von Hardenberg and Mrs. von Alten. (Pet. A. 2-3.)

After an extensive search, the petitioners, Mrs. von Alten and Mrs. von Hardenberg, were found residing in Germany. They were quite elderly and had suffered greatly from the war. Their financial circumstances were so desperate that they were unable to advance money for court costs. (Pet. A. 18-19.)

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*Sometimes referred to in the Circuit Court as Irmengard Wilhelmina Luise Nina Von Wengersky Von Schiller or combinations thereof.

THE PURPORTED VESTING AND RESULTING OUSTER—1950.

The *Orme* litigation was prolonged by delays and volumes of pleadings and motions. The case was referred to a Master in Chancery.

On March 29 and April 27, 1949, as the case entered its seventh year in the courts, and long after the war between the United States and Germany had ended, respondent the United States Attorney General issued an order "vesting" the interests of petitioners Adelheit von Hardenberg and Irmgard von Alten in the trust created by the Bigelow will. He asserted that this vesting order was authorized by Section 8(c) of the Trading With the Enemy Act. (50 U.S.C.A. App. §7.) The vesting orders are published at 14 Federal Register 1660 (No. 13022) and 14 Federal Register 2227 (No. 13192). (Pet. A. 3-4.)

Respondent thereafter presented a petition to the Chancellor requesting that, on the basis of the vesting orders, he be substituted as a defendant in lieu of Mrs. von Hardenberg and Mrs. von Alten. (Pet. A. 3-4.) Petitioners answered the petition, contesting the right of respondent to vest their interests. They took the position that the power of respondent under the Trading With the Enemy Act to vest property of German citizens ceased upon termination of hostilities in 1945, even though a technical state of war still existed between the United States and Germany. (Pet. A. 4-8.) On the same day, a petition was filed on behalf of Mrs. von Hardenberg and Mrs. von Alten, requesting that counsel be permitted to formally appear and defend in their behalf (A. 8-10); the Chancellor granted this petition. (Pet. A. 10.) Respondent thereafter moved to vacate this order (A. 10), and petitioners answered his motion. (Pet. A. 11-12.)

On November 9, 1950 (prior to the death in 1951 of Sarah de Haven, the last of Louisa Bigelow's 3 grandchildren to die), the Chancellor entered an order permit-

ting the respondent to substitute as a party defendant in lieu of petitioners. However, the court required that all pleadings and notices be served on petitioners. (Pet. A. 12-13.)

Petitioners filed notice of appeal from this order directly to the Supreme Court of Illinois, contending that the purported vesting was unlawful and confiscatory. (A. 13.) Briefs were filed and oral argument had. On November 27, 1951, the court held (1) that respondent had power to vest property of German citizens despite cessation of hostilities so long as a technical state of war existed, and (2) that the court had no authority to review the discretion exercised by respondent in entering the vesting order. The court affirmed the order of substitution. (Pet. A. 13; 410 Ill. 354, 102 N.E. 2d 335.) This Court denied petitioners' petition for writ of certiorari. (343 U.S. 921, April 7, 1952, sub nom. *Von Hardenberg* v. *McGrath*.)

No issue was raised or determined as to whether petitioners' interest in the income or corpus of the Bigelow trust was the kind of interest that was subject to the vesting powers of respondent. Nor had the nature of petitioners' interest in the trust been adjudicated at that time.

Thereafter petitioners' counsel received notices of all proceedings in the case, but they were not permitted to participate actively. (Pet. A. 13.)

Sarah de Haven died February 4, 1951. She was the last of Louisa Bigelow's three granddaughters to die.

THE FINAL DECREE—1959.

The Master filed his report as to the merits in 1957, and as to attorneys' fees in 1958. The final decree was entered by the Chancellor on March 2, 1959. (Pet. A. 13.) The decree, which adopts the Master's findings in virtually every

respect, rejects Orme's construction of the will, and construes Louisa Bigelow's will to mean (1) that each of the three granddaughters obtained a life interest in the trust, (2) that upon the deaths of Josephine and Louise, who died in 1919 and 1941, respectively, their children were entitled to receive income from an undivided one-third of the trust assets; (3) that the children of Josephine and Louise, respectively (including petitioners), each received a vested equitable remainder interest in one-third of the principal of the trust assets at the time of their mother's death, but that possession and enjoyment thereof was deferred until the death of Sarah de Haven, the last surviving grandchild of Louise, in 1951; (4) that upon Sarah's death in 1951 the children (including petitioners) of each of Louisa's three granddaughters were entitled to receive and divide one-third of the trust assets *per stirpes*. (Pet. A. 13-18.)

The decree provides further that the interest of petitioners in income and in the corpus of the trust were validly vested by respondent, and "upon the death of Sarah de Haven said interests (principal and accumulated undistributed income) became distributable to [respondent] to be held and disposed of for the purpose and subject to the provisions of the Trading With the Enemy Act, as amended, and the executive orders issued pursuant thereto . . ." (Pet. A. 14-15.) See Appendix D, page App. 37.

The Chancellor found that the undistributed principal and income of the share from which Louise de Haven had income during her life is worth approximately $769,223.09. (Res. A. 331.) This is the property which petitioners Adelheit von Hardenberg and Irmgard von Alten inherited from their great-grandmother Louisa G. Bigelow.

PETITIONER'S APPEAL.

Respondent appealed to the Illinois Appellate Court from the fee allowances in the decree. (Pet. A. 18.) Petitioners cross appealed, claiming (*inter alia*) that their remainder interest in the trust, as construed by the Chancellor, was not within the scope of or subject to the vesting order, because their interest was not acquired until 1951 when Sarah de Haven died. (Pet. A. 18.) Petitioners contended that the Chancellor erred in holding that their interest in the corpus of the Bigelow trust was the kind of interest which was subject to the vesting power, and in ordering the trustee to distribute their remainder interest in the trust to respondent. Petitioners do not question the correctness of the decree insofar as it upholds the vesting of income payable to petitioners from the trust prior to December 31, 1946.

Petitioners moved to transfer the case to the Supreme Court of Illinois on the ground that Constitutional issues were raised by the cross appeal. (Pet. A. 20-26.) The Appellate Court denied these motions. (Pet. A. 27.)

The Appellate Court affirmed the decree on the issue appealed by petitioners. (App. B, pp. App. 1 to App. 17; 29 Ill. App. 2d 75, 172 N.E. 2d 413.) The Supreme Court of Illinois granted petitioners' petition for leave to appeal from the judgment of the Appellate Court. (The Court also granted petitions for leave to appeal of Raymond de Haven and Alice Lohrer, and the cases were consolidated for hearing.)

Thereafter the Supreme Court affirmed the judgment of the Appellate Court as it related to the vesting of petitioners' property. (App. A, pp. App. 18 to App. 35; 25 Ill. 2d 151, 183 N.E. 2d 505.)

Petitioners now seek this Court's review of the judgment of the Supreme Court of Illinois.

REASONS FOR GRANTING THE WRIT.

I.

THIS CASE INVOLVES AN IMPORTANT FEDERAL QUESTION NOT HERETOFORE DETERMINED BY THIS COURT.

The Supreme Court of Illinois has held that property of German nationals may be confiscated under the Trading With The Enemy Act even though the property taken was not acquired by the nationals until 1951, four years after the Attorney General announced that "the Office of Alien Property, Department of Justice, will not vest German or Japanese interests acquired after December 31, 1946".

Petitioners contend that the Attorney General is bound by his proclamation, and that he therefore had no power to vest petitioners' interest in the Bigelow Trust.

The chancellor found that petitioners did not acquire the right to possession and enjoyment of their interest in the Bigelow Trust until the death of Sarah de Haven in 1951.

The issue presented in this case has never been determined by this Court. It is an issue of importance not only to the persons whose property has been taken by post-1946 vesting orders, but also to our country in its future relations with Germany and Japan.

This Court has never had occasion to enunciate the kinds of property interests subject to the vesting power after 1946. In addition to the cases cited in Part II of this petition, other cases dealing with this or related questions are *Hermann* v. *Rogers*, 256 F. 2d 871 (9th Cir. 1958), vacated and remanded 358 U.S. 332 (1959), opinion on re-

mand 274 F. 2d 842 (9th Cir. 1960), cert. denied 364 U. S. 821 (1960); *Rogers* v. *Hartford Connecticut Trust Co.*, 165 F. Supp. 116 (D. Conn. 1958); *Kammholz* v. *Allen*, 256 F. 2d 437 (2d Cir. 1958); *Von Bredow* v. *U. S.*, 169 F. Supp. 256 (Ct. of Cl. 1959); *Schieb* v. *U. S.*, 173 F. Supp. 611 (Ct. of Cl. 1959); *In re Schmidt's Will*, 256 Minn. 64, 97 N.W. 2d 441 (1959).

The validity of many of the numerous vesting orders issued by the Attorney General after December 31, 1946 are and will continue to be subject to legitimate question and continued litigation until this Court rules on the issue involved here.

II.

THE DECISION OF THE COURT BELOW IS IN CONFLICT WITH DECISIONS OF THE COURT OF CLAIMS AND OF THE APPELLATE COURT OF INDIANA.

Two courts have reached conclusions diametrically opposed to the decision of the Supreme Court of Illinois in this case. Petitioners submit that this conflict is of sufficient importance to warrant this Court's exercise of its certiorari powers.

(1)

THE NIEHAUS CASE.

In February, 1959, the United States Court of Claims held that interests such as those of petitioners in the Bigelow Trust were and are *not* subject to being vested by the Attorney General under the Trading With the Enemy Act. *GMO Niehaus & Co.* v. *United States*, 170 F. Supp. 419 (Ct. Cl., Feb. 11, 1959). The individual plaintiffs were German residents who obtained interests in certain bank deposits and securities in this country after December 31,

1946. On July 26, 1951, the Director of the Office of Alien Property issued a vesting order purporting to vest in the Attorney General plaintiffs' interests in the property. Plaintiffs filed a petition in the Court of Claims to recover the value of the property taken from them. The Government first moved to dismiss the petition on the ground, *inter alia*, that the vesting was authorized by Section 5 of the Trading With the Enemy Act. This motion was denied (153 F. Supp. 428 at p. 431):

> "The authorities cited and sound reasoning lead, we think, to the following conclusions. *A purported seizure or 'vesting' of enemy property, which seizure or vesting is not authorized by statute, is a nullity, and does not affect the title of the enemy owner.* He is, during the war, disabled from vindicating his title by suit. When the war ends, and our courts are again open to him, he may vindicate his title in whatever court may have jurisdiction of his case." (Emphasis added.)

The Government then moved for summary judgment. The opinion of the Court of Claims was released February 11, 1959 (170 F. Supp. 419). In denying the Government's motion, Judge Madden pointed out that the power to vest property of foreign nationals was delegated by Congress to the President or any agent or person designated by the President, "when, as, and upon the terms, directed by the President." (50 U.S.C.A. App. 5(b) (13.)

Accordingly, *the President has the power to determine when the vesting of property of enemy nationals shall begin and when it shall end.*

By Executive Order 9095, dated March 11, 1942 (7 F.R. 1971), the President created the Office of Alien Property Custodian and provided that the property of foreign na-

tionals will vest in the custodian "whenever the Alien Property Custodian shall so direct." This function was transferred to the Attorney General of the United States on October 14, 1946. Executive Order 9788, 11 F.R. 11981; 50 U.S.C.A. App. §6 Note.

On December 31, 1946, the President proclaimed the cessation of hostilities in World War II, but stated that "a state of war still exists." (12 F.R. 1, 50 U.S.C.A. App. §601 Note.)

On March 4, 1947, a press release was issued by the Secretaries of the Treasury, State and War, and the Attorney General, announcing new rules with regard to trade with the enemy and treatment of property of enemy aliens. The document contains the following statement:

> "In this connection, the Attorney General also announced that henceforth, in general, the Office of Alien Property, Department of Justice, will not vest German or Japanese interests acquired after December 31, 1946."

On July 9, 1951 President Truman wrote identical letters to the Vice President, as President of the Senate, and the Speaker of the House of Representatives, asking them to place before their respective legislative bodies the President's proposal for Congressional action terminating the state of war between the United States and Germany, but preserving the right of the United States to vest the property of Germans which was acquired by them before January 1, 1947. The President's letters contained the following:

> ". . . The vesting of German property under this program does not extend to property acquired since the resumption of trade with Germany on January 1, 1947, following the cessation of hostilities. . . ."

Judge Madden concluded that the Attorney General was bound by the statements contained in his press release and the President's letter. The Court of Claims held that property acquired by German nationals after December 31, 1946 was not subject to the vesting power of the Attorney General, and any attempt to vest such property was void and of no effect.

(2)

THE CALUMET NATIONAL BANK CASE.

In *Rogers* v. *Calumet National Bank of Hammond*, Herbert M. Paszotta had created a testamentary trust which took effect at the time of his death on November 11, 1943, by which he established a trust for Klara Huhn and Wanda Puppel, both then residents of Berlin, Germany. The trust instrument provided that the trustee was to hold the property for the benefit of Huhn and Puppel during their natural lives "or until the termination of hostilities now in existence between the United States of America and the Nation of Germany", and that the trustee was to convey the entire principal of the trust to Huhn and Puppel "upon the cessation of the aforesaid state of hostilities." The trust instrument contained a gift-over provision in the event that hostilities did not cease until after the deaths of Huhn and Puppel.

On October 5, 1950 the Attorney General issued a vesting order purporting to vest the interests of Huhn and Puppel in the trust assets. The trustee distributed the assets in disregard of the vesting order, whereupon the Attorney General brought an action against the trustee to recover the value of the assets. The Appellate Court of Indiana held that the absolute ownership of the trust assets vested in Huhn and Puppel on December 31, 1946, the date of cessation of hostilities between the United States and Germany. The Court held, however, that the Attorney

General had abused his discretion in vesting this property because there was no showing of a need for him to do so at the time of the vesting in 1950. 149 N.E. 2d 214 (1958).

The Attorney General's petition to this Court for writ of certiorari was granted, and on January 26, 1959 the Court issued a *per curiam* opinion (358 U.S. 331) reversing the judgment of the Indiana court. The Court held that "a State court is without power to review the discretion exercised by the Attorney General of the United States under Federal law."*

However, this Court remanded the case to the Appellate Court of Indiana with the notation that, on remand, the Indiana Court was "free to consider other questions presented by this record in light of General License 94, 12 Fed. Reg. 1457 [which *inter alia* grants a general license to German nationals to be regarded as if they were not foreign nationals under Executive Order 9095, effective December 31, 1945], as it may have affected the definition of 'national' in Executive Order 9095, 7 Fed. Reg. 1971, as amended, and Executive Order 8389, 5 Fed. Reg. 1400. See *GMO Niehaus & Co. v. United States*, 139 Ct. Cl. 605, 153 F. Supp. 428."

Thus, while upholding the Attorney General's power to vest in the year 1950, this Court instructed the Appellate Court of Indiana to reconsider whether the property involved was of the kind which fell within the authorized purview of the Attorney General's vesting power.

The parallel to the case at bar is clear: Although the Attorney General had power in 1949 to issue vesting orders, there remains the question whether the property interest of petitioners purportedly vested was subject to the vesting power or affected by the vesting order.

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* This holding is the equivalent of the holding of the Illinois Supreme Court on the first appeal in the case at bar.

On remand from this Court, the Appellate Court of Indiana reversed its prior finding that ownership of the trusts vested in Huhn and Puppel on December 31, 1946, and held instead that their rights were not acquired until after that day, thus removing the property from the ambit of the Attorney General's power to vest.

The Indiana court called attention to "the reluctance of that court [the Supreme Court of the United States] to approve the seizures made by the appellant [the Attorney General] under the existing conditions and circumstances, and its implied favorable regard of the property rights of those affected by such seizure. If such was not the attitude and leaning of that court, then its admonition was fruitless and needless. We are not inclined to ascribe such idleness to that important and busy Tribunal." *Rogers* v. *Calumet National Bank of Hammond*, 172 N.E. 2d 904, 908 (App. Ct. of Ind., Mar. 10, 1961, rehearing denied April 14, 1961).

Respondent made no effort to seek review of this decision.

These decisions reflect an understandable and salutary effort on the part of courts to prevent confiscations attempted through distortions of the legitimate purposes of the Trading With the Enemy Act. They are inconsistent with the holding of the Illinois Supreme Court in the case at bar. We submit that the time has come for this Court to articulate what kinds of property interests could be vested after 1946.

III.

PETITIONERS ACQUIRED THEIR REMAINDER INTEREST IN THE BIGELOW TRUST IN 1951. THEREFORE THE VESTING ORDER DID NOT ENCOMPASS THEIR REMAINDER INTEREST.

When their mother died in 1941, petitioners obtained only an equitable interest in the trust, and the right to receive income. The Chancellor determined that it was not until Sarah de Haven died in 1951, two years after the purported vesting, that petitioners, as the only issue of Louise de Haven, were entitled to obtain and reduce to possession, and thus acquire, their share of the Bigelow trust. Accordingly, as President Truman put it, this property was "acquired since the resumption of trade with Germany on January 1, 1947," and therefore was not subject to the Attorney General's vesting power.

Both the ordinary and technical legal meanings of the word "acquire" support our position. "Acquire" is defined to mean "to come into possession of; get as one's own: to acquire property." American College Dictionary (1955), page 11. This Court has adopted this meaning of "acquired." In *Helvering* v. *San Joaquin Co.*, 297 U.S. 496 (1935), this Court said (297 U.S. at p. 499):

> ". . . The word 'acquired' is not a term of art in the law of property but one in common use. The plain import of the word is 'obtained as one's own'. . . ."

Not until the death of Sarah de Haven in 1951 did petitioners "obtain as their own" a share in the principal of the trust.

Petitioners submit that this interpretation of the word "acquire" squares with the purposes of the Trading With the Enemy Act, which was designed to prevent enemy

aliens from using property or assets situated in the United States in the war effort against our country. This purpose clearly does not encompass property which is not yet reduced to possession by the German citizen, property which he could not obtain or make use of in any way.

Extending the vesting powers granted by the Trading With the Enemy Act to petitioners' future interest in the Bigelow trust does violence to the Act's legitimate purposes. This Court should correct the erroneous and unjust interpretation which was placed on that Act by the court below.

IV.

THE PRIOR DECISION IS NOT RES JUDICATA OR THE LAW OF THE CASE.

In 1951, the Illinois Supreme Court determined that respondent had power to vest property of petitioners by orders issued in 1949, but the court did not rule upon *what property* was within the purview of the vesting order.

In 1950, when the decree ousting petitioners was entered, Sarah de Haven was still living. Petitioners had not yet acquired possession and enjoyment of their portion of the trust corpus. Not until 1959 was the nature of petitioners' remainder interest in the Bigelow trust adjudicated. When the final decree was entered, petitioners were able for the first time to determine, and to contend, that their interest, having been acquired after December 31, 1946, was not subject to being vested by the 1949 order, and that therefore the chancellor erred in ordering the trustee to make distribution of petitioners' share to respondent.

Conclusion

This case presents an important and novel issue relating to the Trading With the Enemy Act. There is a conflict among lower courts as to the effect of vesting orders in cases such as this. We submit that this case is worthy of this Court's consideration, and we ask the Court to exercise its discretion in favor of issuing its writ of certiorari to the Supreme Court of Illinois.

Respectfully submitted,

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APPENDIX A.

Opinion of the Supreme Court of Illinois filed May 25, 1962, reported at 25 Ill. 2d 151, 183 N.E. 2d 505.

Mr. JUSTICE DAILY delivered the opinion of the court:

Plaintiff Eugene Orme instituted proceedings in 1943 in the circuit court of Cook County to construe the will of Louisa G. Bigelow, which established a trust presently held by the defendant Northern Trust Company. The decree, rejecting plaintiff's interpretation of the instrument but authorizing that attorney fees be paid from the estate, was entered some 15 years later. It was substantially affirmed by the Appellate Court, and we have allowed and consolidated the diverse appeals of the alleged beneficiaries of the trust. This appeal also includes requests for relief under our Rule 32(4) filed by plaintiff, and by the Attorney General of the United States who vested the interests of certain German beneficiaries under the Trading With the Enemy Act. Tit. 50 App. U.S.C.A. 7(*e*).

The issues presented by this consolidated appeal include: whether a 1920 trial court decree barred plaintiff Orme's action under the doctrine of *res judicata;* whether the Rule in *Shelley's* case applied to the Bigelow will and created a fee simple interest in plaintiff's devisor; whether an adoptee of testatrix's grandchild is included within the designation "children or heirs" in the will; whether the interests of the enemy aliens were properly vested by the Attorney General; and the propriety of the amount and allocation of counsel fees.

From the voluminous record it appears that on May 26, 1873, Louisa G. Bigelow executed her will creating a trust for her three minor granddaughters, ages 8, 6 and 4, re-

spectively. The will, which will be considered in greater detail hereinafter, essentially provided life estates for the granddaughters, and on the death of the last surviving granddaughter the trust estate was to be divided equally among the "children or heirs" of the granddaughters; ⅓ to the "child or children, heirs or heirs" of each of them. In case of the death of any of the granddaughters "without issue," the property was to go to the "issue, heir or heirs" of the other granddaughters, and if all three grandchildren died "without issue or heirs" then the property was to go to the testatrix's immediate heirs and legal representatives according to the laws of Illinois. The will, apparently drafted by an American lawyer, was executed in Switzerland where testatrix, a woman over 70, was then residing. She died there August 31, 1873, and the will was probated in Illinois.

The granddaughters, who each married and had children, are referred to herein as Josephine Caldwell, Louise de Haven, and Sarah von Campe. The oldest, Josephine, died in 1919, leaving five children. They instituted proceedings to determine their rights under the will to the income from the share enjoyed by Josephine during her lifetime, and as affected by certain conveyances executed by Josephine's son William. That action joined Louise and Sarah, and culminated in the "1920 decree," which defendants claim is dispositive of this litigation. The terms of that decree will therefore be examined when we consider the merits of that claim.

In 1941 the second granddaughter, Louise died. It appears that she had married German Baron von Alten in 1896, and in 1913 had become estranged from him and from her two daughters. She returned to the United States as soon as possible after World War I, had her citizenship

restored by Act of Congress in 1920, and obtained a Nevada divorce in 1921. In 1923 she adopted an adult heir, the defendant Raymond de Haven. From her correspondence with the trustee in 1940 she evidenced concern that her German children and the German children of her sister Sarah von Campe would obtain ⅔ of the American estate, contrary to the intention of her grandmother. She was assured by the trustee that the 1920 litigation did not dispose of her interest. She then executed a codicil in 1941 devising to plaintiff, Dr. Eugène Orme, all of her undivided ⅓ interest in any principal or income in her grandmother's estate.

After the trustee refused to recognize Orme's interest under that codicil, Orme then instituted this proceeding in 1943. His complaint urges that the Bigelow will be construed to give Louise a fee-simple interest by operation of the Rule in *Shelley's* case, or alternatively, that the will was not capable of construction, so that Mrs. Bigelow died intestate with respect to the equitable remainder in trust.

The litigation proceeded tortuously during the ensuing years, with multifarious motions to dismiss argued repetitively by the trustee and by the parties, and with amended pleadings, counterclaims and subsidiary litigation. Raymond de Haven filed a counterclaim to ⅓ of the de Haven share as the adopted heir of Louise; Josephine's children insisted by motions that the cause was barred by the 1920 decree; and in 1949 the Attorney General of the United States became a party by virtue of vesting the interests of Louise's German daughters (Adelheit von Hardenberg and Irmgard von Alten) under the Trading With the Enemy Act. The case was delayed several years by subsidiary litigation adjudicating the propriety of the vesting and the dismissal of the Germans from the case. *Orme* v. *Northern Trust Co.* 410 Ill. 354, cert. den. *Von Hardenberg* v. *McGrath,* 343 U.S. 921, 96 L. ed. 1334.

In 1951 the testatrix's third granddaughter, Sarah von Campe, died in Switzerland. She was survived by her daughter, defendant Alice Lohrer, and by two sons, Edwin and Otto von Campe. Although Sarah had in her lifetime favored plaintiff's claim, she had been persuaded by her attorney to join the trustee in opposing it. Allegedly as a consequence of this pending litigation, she devised her entire estate to her daughter, who irrevocably assigned ⅓ to her brother Edwin. The interest of Otto, an enemy alien, was vested by the Attorney General.

After pleading consolidations and fact stipulations, the cause was finally tried before a master during some 24 days in 1955. The master's report, filed in 1957, recommended that the Bigelow will be construed to give an equitable life estate to testatrix's three granddaughters with equitable remainders to their "issue," rather than to their heirs-at-law; and that since the Rule in *Shelley's* case would not apply, the wills of Louise de Haven and the Sarah von Campe would not transfer interests in the Bigelow estate, and plaintiff's claim should be denied. The report further recommended that the decree should not affect the interests of those entitled to distribution of the share formerly held for Josephine, and that all parties be allowed attorney fees, which would be charged against the shares of Louise and Sarah.

Upon failure of the parties to agree on the amount of legal fees, hearings on this issue were held before the master, who issued a report recommending fees totalling $221,000. The master's recommendations with respect to the substantive rights of the parties and the allocation of legal fees were adopted by the circuit court in its decree of March 2, 1959. The matter of fees became the basis of the Attorney General's appeal to the Appellate Court, which

affirmed the circuit court, except that it increased by some $3,000 the counsel fees allowed de Haven, to include services relating to the collateral attack on his adoption, and charged those fees solely against the de Haven share.

In adjudicating the diverse contentions of each of the parties on this consolidated appeal, we shall consider first whether this litigation is barred by the 1920 decree under the doctrine of *res judicata*. Since plaintiff's devisor, Louise de Haven, was joined in that earlier proceeding which involved a partial construction of the Bigelow will, plaintiff would ordinarily be bound under that doctrine by the issues determined, and those which properly could have been presented there. *Altemeier* v. *Harris*, 403 Ill. 345.

As we have noted, that litigation was instituted by Josephine's children on her death to determine the disposition of her share of the income, particularly as it was affected by certain conveyances by her bankrupt son William. The main issue was whether William's share was to be divided among Josephine's four other children, or go to William's wife and children under his deeds.

Since the Bigelow will was silent on the disposition of income on the death of testatrix's grandchild *with issue* while the other grandchildren were living, the court endeavored to find guidance in other provisions of the will. After concluding that the will was valid and must continue until the death of the last grandchild, the decree made certain findings with respect to the principal and income of Josephine's share. It recited that *by a construction of the will and as a result of the events which have happened*, on Josephine's death her four children and the wife and children of her son William came into possession and enjoyment (subject to the trust) of an equitable, but vested, fee in enumerated percentages of the share in which Josephine

had a life interest. The decree further provided that the income therefrom was to be divided among them in the same proportion as their interest in the fee.

Although the decree recited that the question of construction with respect to Josephine's interest related equally to the disposition of income and the equitable interest in the principal on the death of Louise and Sarah with surviving children, we perceive nothing in that 1920 decree which is inimical to plaintiff's claim. The conclusion that Josephine's children had a fee interest is in no way inconsistent with plaintiff's theory that testatrix's grandchildren acquired a fee interest by operation of the Rule in *Shelley's* case, which interest could pass by devise or descent. Unlike the *Altemeier* case (403 Ill. 345,) cited by defendants, plaintiff's claim does not run counter to the disposition or conclusions in the prior decree.

In judging the scope of the 1920 decree we find significance in its omissions and reservations. Nowhere is there any reference to "remainders," or any construction of the words "children or heirs," either as words of "purchase" or "limitation," or any other statement of the basis for its conclusion. Morever, the decree itself specifies that it does not pass upon certain enumerated contingencies on the death of Louise or Sarah, or "*upon any question of construction not herein determined and settled.*" (Emphasis supplied.)

Even more cogent is the fact that the court in the earlier litigation was confronted with entirely different issues. The court was not called upon, as in the instant case, to determine whether the interests of the granddaughter's children were acquired by "purchase" or by "descent." It was only required to determine whether Josephine's children were entitled to her share of the income and just how their

interests were affected by William's deeds. The adversaries there were William, his wife and children on one hand and his brothers and sisters on the other. Hence, the Rule in *Shelley's* case was neither determinative nor involved in the adjudication of their adverse claims. That situation is in sharp contrast with the case at bar which raises squarely for the first time the issue of whether the testatrix's granddaughter had an interest capable of being devised. On that issue the Rule in *Shelley's* case is determinative.

In our judgment this basic difference in issues between the 1920 litigation and the instant case, considered along with the deliberate omissions and reservations in the earlier decree, indicate conclusively that the Rule in *Shelley's* case, on which plaintiff's claim is based, was in no way adjudicated in that prior litigation. Hence the 1920 trial court decree should not be deemed *res judicata* of this litigation. This conclusion, moreover, is in accord with that of the three chancellors who denied defendants' numerous motions to dismiss, and with the decision of the Appellate Court. *Orme* v. *Northern Trust Co.* 29 Ill. App. 2d 75.

It is therefore incumbent upon us to determine the merits of plaintiff's claim that the Rule in *Shelley's* case applied to the Bigelow will and gave Louise de Haven a fee interest which she devised to plaintiff. And although that venerable Rule was abolished in Illinois in 1953 (Ill. Rev. Stat. 1955, chap. 30, pars. 186, 187,) since it was in force when the Bigelow will was executed, (*Baker* v. *Scott*, 62 Ill. 86,) it must be given effect, if applicable.

The Rule in *Shelley's* case is simply that when a life estate is given to a person, followed by a remainder to his heirs, the heirs take nothing, but the life tenant takes the entire fee. The rule applies only where the gift in remain-

der refers to an indefinite line of succession, rather than to a specific class of takers. (Carey & Schuyler, Illinois Law of Future Interests, p. 151.) Before the Rule in *Shelley's* case can apply, the will must be construed to determine if such life estates and remainders were created. *Lydick* v. *Tate*, 380 Ill. 616, 622.

The relevant portions of the Bigelow will are paragraphs 4, 5, 6 and 7 of section 2. Paragraph 4 provides for the payment of income from the real and personal property to the grandchildren in equal parts *during their natural lives*. Paragraph 5 provides for the distribution of income on the death of a granddaughter *without issue*, and gives her share to the other grandchildren. Paragraph 6 provides that the trust continue during the natural lives of the grandchildren, and that after the death of all the grandchildren the property shall be divided equally among the *children or heirs* of the grandchildren, with 1/3 to the *child or children, heir or heirs* of each named grandchild. In case of the death of any of said grandchildren *without issue* the particular share would go to the *issue, heir or heirs* of the other grandchildren; and on the death of two grandchildren *without issue*, then the whole estate shall go to the *issue or heirs* of the third grandchild. This paragraph further specifies that it is the intention of the testatrix that the property shall remain intact *free from the husbands* of any of the grandchildren, and that after the death of each and every one of them the property shall be divided among *their issue as hereinbefore specified*. Paragraph 7 provides that on the death of all the grandchildren *without issue or heirs*, the property goes to the testatrix's *immediate heirs and legal representatives* under the laws of Illinois.

In construing this classic example of inept legal draftsmanship, the words "children or heirs" must be viewed in the light of the context of the will. (*Baker* v. *Forsuman*,

15 Ill. 2d 353, 359; Carey & Schuyler, Illinois Law of Future Interests, p. 163.) Plaintiff argues that the words should be construed to mean "heirs" in the technical sense, since the word "heirs" encompasses children, and is used here as a synonym to explain and enlarge that class. That interpretation, however, is inconsistent with the other provisions of the will. The fact that testatrix provided a gift over if any of the grandchildren died *without issue* indicates that she intended the remainder to go to specific takers, *i.e.*, the issue of each grandchild, rather than to an indefinite line of succession. If "heirs" in the technical sense had been intended, no such gift over on failure of "issue" would have been necessary or appropriate.

Plaintiff's interpretation also conflicts with testatrix's statement of her intention in this same paragraph. Here she not only excludes husbands but explains that after the death of each grandchild the property shall be apportioned among "*their issue as hereinbefore specified.*" Her use of the word "issue" alone and her assumption that this is the disposition she has already specified certainly militates against any interpretation that she intended to use the word "heirs" in its technical sense.

It would unduly prolong this opinion and be of limited value if we were to review the exhaustive authorities cited by counsel, since no will has a twin or even a brother. (*Hartwick* v. *Heberling*, 364 Ill. 523.) Plaintiff urges us, however, to adopt the reasoning of the Pennsylvania court in *Shapely* v. *Diehl*, 203 Pa. 566, 53 Atl. 374, which held that a limitation to a party for his natural life and at his death to his "children or heirs" created a fee in the first taker. The court found that the testator used the word "children," not as "*descriptio personarum*," but as the first in a line of succession, and that he added the word

"heir" as a synonym to enlarge and explain the preceding word "children." Therefore, the words "children or heirs" meant "heirs" in the technical sense, and the Rule in *Shelley's* case applied. But since the testatrix in the instant case manifested a different intention in her will by specifically stating that the property should be apportioned among the *issue* of her grandchildren, and providing gifts over if any of them died without issue—features which are not involved in the *Shapely* case—that decision can hardly be deemed determinative.

Those features also distinguish the case at bar from *Hartwick* v. *Heberling*, 364 Ill. 523, also cited by plaintiff, where we applied the Rule in *Shelley's* case to a will giving a person an estate during her natural life and at her decease to her "children *and* lawful heirs." The use of the word "and" in that limitation, rather than "or" as in the instant case, is an additional distinguishing element.

The case at bar is more analogous to the cases holding that in gifts to a person and her (their) "heirs," with gifts over in case the first taker dies without issue, the word "heirs" will not be construed technically. It is interpreted to mean "issue," and, consequently, the Rule in *Shelley's* case cannot apply. (*Winchell* v. *Winchell*, 259 Ill. 471; *Baker* v. *Forsuman*, 15 Ill. 2d 353.) In the *Winchell* case the court, in reversing a decree applying the Rule in *Shelley's* case, stated at p. 474: "His [testator's] intention was to limit the remainder to the heirs of the body of the complainant, since it was only in default of such heirs that the remainder was to go to others."

In our judgment the words "children or heirs" in the Bigelow will, construed in their context, and in the light of the decisions, meant that the property should go to the children of testatrix's granddaughters, if there were any living, or, if not, then the issue of each grandchild. Under

this interpretation the will created a life estate in each granddaughter, and a remainder to her children or issue. The Rule in *Shelley's* case, is therefore, not applicable, and plaintiff's claim, based thereon, must be denied.

We must determine next whether Raymond de Haven, as the adopted heir of Louise, is entitled to share in the estate as a member of the designated class of remaindermen. We find no merit in the Attorney General's collateral attack on de Haven's adoption. Since the Attorney General was not a party to that proceeding, he can question only want of jurisdiction of the subject matter. (*Gebhardt* v. *Warren*, 399 Ill. 196.) The stipulated facts show that the adoption decree was entered in full compliance with the Colorado statute, and was therefore entitled to full faith and credit in this proceeding. *In re Estate of Leichtenberg*, 7 Ill. 2d 545.

We recognize, as de Haven insists, that the testatrix is presumed to have executed her will in accordance with existing adoption law (*Belfield* v. *Findlay*, 389 Ill. 526), which in this case was the act of 1867. That act authorized adoptees to inherit from their adopting parents, but provided that as to all other persons the adopted child shall stand as if no such adoption had taken place. As de Haven emphasizes, that act was not as restrictive as the 1874 act, which specifically barred adoptees from inheriting property from lineal or collateral kindred. However, merely because the 1867 law contained no such specific prohibition does not warrant charging testatrix with a presumed intention to include an adoptee in her will. On the contrary, the Bigelow will itself precludes any such construction. It reveals instead a testamentary intention to limit the property to testatrix's blood kin by excluding husbands of the grandchildren, and by providing a gift over to their "issue," a concept which, at that time, meant heirs of the body. *Keegan* v. *Geraghty*, 101 Ill. 26, 35; *Winchell* v. *Winchell*, 259 Ill. 471.

While we perceive de Haven's distinction between taking through an adopting parent and taking directly from an ancestor, as noted in the cited dictum in *Continental Illinois Nat. Bank and Trust Co.* v. *Clancy*, 18 Ill. 2d 124, it has no application here in view of the tenor of the will itself. In our judgment, therefore, the claim of Raymond de Haven was properly denied.

With respect to the claims of defendants von Hardenberg and von Alten, Louise's German children, they now contend that they acquired their interests, not on the death of their mother in 1941, but on the death of Sarah von Campe, the last surviving grandchild, in 1951; hence, since their interests were acquired after 1946, they could not be vested by the Attorney General. They argue further that this issue was not determined in the prior litigation in this court.

We find no merit to either of these arguments. Our prior judgment, (*Orme* v. *Northern Trust Co.* 410 Ill. 354) specifically determined the right of the Attorney General to vest these particular interests in 1949. We did not adjudicate his power *in vacuo*. Moreover, even if that issue had not been adjudicated, it would not affect defendants' rights. While the trust was to continue until the death of the last surviving granddaughter, defendants' interests in the estate were acquired on the death of their mother in 1941. At that time they were not only entitled to the income from her share, but they acquired their proportionate share of the equitable fee in the estate. The fact that it was postponed in enjoyment pending the duration of the trust did not affect its acquisition or its indefeasibility as of that time. The interests of said defendants were therefore properly vested by the Attorney General, and their claims here were rightfully denied. The cases of *GMD. Nichaus*

& Co. v. *United States*, (U.S. Ct. Cl.) 170 F. Supp. 419, and *Rogers* v. *Calumet Nat. Bank of Hammond*, 358 U.S. 331, 3 L. ed. 2d 344, cited by defendants, are inapplicable. Their remedy is under the Trading With the Enemy Act, as previously determined.

With respect to the amount and allocation of counsel fees, the parties are in disagreement with each other. In will construction cases the costs of litigation are borne by the estate on the theory that the testator expressed his intention so ambiguously as to necessitate construction of the instrument in order to resolve adverse claims to the property. (*Dean* v. *Northern Trust Co.*, 266 Ill. 205.) Legal fees are allowed to a party even though the construction adopted is adverse to his claim. (*Ingraham* v. *Ingraham*; 169 Ill. 432, 471; *Haight* v. *Royce*, 274 Ill. 162.) However, such fees should not be authorized where such construction is unnecessary. (*Brumsey* v. *Brumsey*, 351 Ill. 414; *Bartlett* v. *Mutual Benefit Life Ins. Co.* 358 Ill. 452.) The criterion is whether an honest difference of opinion exists. *In re Estate of Reeve*, 393 Ill. 272, 294; *La Salle Nat. Bank* v. *MacDonald*, 2 Ill. 2d 581; *Strickland* v. *Strickland*, 271 Ill. 614.

In applying that criterion, analogy may be made to *Cahill* v. *Cahill*, 402 Ill. 416. Although the court there rejected the plaintiff's interpretation that the Rule in *Shelley's* case applied to a will, it did allow him attorney fees on the ground that a remainder to "heirs of blood" presented a serious question of construction of first impression. Similarly, in the instant case the words "children or heirs" presented a "serious question" not previously determined in Illinois case law. In view of the fact that we have vindicated plaintiff's primary contention that the Bigelow will was a "model of ambiguities," which required

construction in order to resolve issues not previously adjudicated between parties, plaintiff should be entitled to attorney fees.

Defendants contend that the fees allowed plaintiff were excessive. However, a cursory review of this record, without attempting to summarize plaintiff's four schedules of services, reveals that this litigation, extending over 15 years, and including some 50 parties, necessitated research and argument on a multitude of legal questions. These problems and services included: locating and securing jurisdiction of foreign and enemy nationals in time of war; the applicability of the doctrine of *res judicata* (argued some three times) and of the Rule in *Shelley's* case to the terms of the Bigelow will; the validity and effect of the de Haven adoption in Colorado; establishing Louise de Haven's citizenship; the propriety of the Attorney General's participation under the Trading With the Enemy Act; the subsidiary litigation over the dismissal of the German beneficiaries; the effect of the death of Sarah Von Campe; the right of the trustee to withdraw the State Street property from the trust; the consolidated pleadings and reargument thereon; the stipulation of facts, exhibits, and preparation for trial; and finally, the trial itself and subsequent arguments on the findings.

Plaintiff's counsel lists some 3,643 hours of service over 15 years, including 411 hours in court. The master allowed him fees for 3,582 hours at a base rate of $25 for court and research time alike, which amounted to $89,550. That rate was applied to all counsel herein and was based on both expert testimony and the standard employed where payments are made out of the property in litigation. See: *Home for Destitute Crippled Children* v. *Boomer's*, 320 Ill. App. 541, 550.

We cannot accept the Attorney General's oversimplification of this litigation as involving merely a construction of the words "children or heirs" in the Bigelow will. In our judgment the issues were interrelated and defy separation in computing fees. In fact, the master's denial of fees for services relating to the million dollar State Street property was tantamount to a substantial reduction of plaintiff's fees. Further exclusions would merely penalize plaintiff for endeavoring to press his claim to a conclusion, and to hurdle the legal roadblocks interposed by defendants' ingenious counsel. The litigation here was costly, not because plaintiff's counsel spent a disproportionate amount of time on any question of law, (*Irwin* v. *Swinney*, (W. D. Mo., W. D.) 45 F. 2d 890), but because of the multiplicity of the interrelated issues, for which plaintiff certainly cannot be blamed.

It may be noted, moreover, that even though plaintiff had to meet all the arguments of all the parties, his allowance for fees barely exceeded the $84,712.50 allowed the trustee, who divided the burden of litigation with the Attorney General and duplicated the arguments of the various parties, and was also awarded some $19,145 for nonlegal services.

In our judgment Raymond de Haven was properly allowed fees covering his entire claim, including the defense of the collateral attack on his adoption, since the elimination of his claim, either on jurisdictional grounds or by a construction of the will, would have benefited all those claiming the de Haven share. Those fees were therefore properly charged solely against the de Haven share.

With respect to the legal fees allowed the German daughters and niece of Louise, we see no reason to interfere with the judgment of the Appellate Court. Our conclusion

is the same as to the fees allowed the Caldwells to protect their indefeasible interests specified in the 1920 decree, and as to those allowed to defendant Lohrer, who contested plaintiff's interpretation of the will.

In determining the proper allocation of these fees we must reject defendant Lohrer's contention that this litigation involves only the de Haven share, which should solely bear its costs. In view of the omissions, reservations and scope of the 1920 decree, this litigation resolves for the first time the nature and extent of the interest of Louise and Sarah and their children. Defendant Lohrer's interest would not have been the same if plaintiff had prevailed in his interpretation of the will. Had plaintiff established the applicability of the Rule in *Shelley's* case, testatrix's granddaughter Sarah would have had a fee simple, which defendant Lohrer would now hold as sole devisee of Sarah. Under our interpretation, Sarah had only a life estate, and defendant Lohrer acquired a 1/3 interest in the fee under the Bigelow will, as did her brothers Edwin and Otto. Inasmuch as she had sufficient interest in this litigation to have incurred $9,000 in counsel fees to contest it, it hardly behooves her to insist that this litigation involves only the de Haven share. Consequently, the chancellor and the Appellate Court properly assessed fees against both the von-Campe and de Haven shares.

Whether the Caldwell portion of the estate should also bear a proportionate share of the total fees authorized is a more difficult question. There is a plausible ring to the Attorney General's contention that if the 1920 decree were not *res judicata* of the issues raised by the plaintiff, then the litigation equally concerned the three portions of the estate. It is patent, however, that the artfully drawn 1920

decree did specifically enumerate the exact percentage of the equitable fee vested in each of the Caldwells, and provided that such interests were indefeasible. No such determination was, or could have been made as to the interests of either Louise or Sarah or their issue. In fact, the decree reserved questions of construction arising after their deaths. Furthermore, the identical persons are entitled to the identical percentages in the Caldwell estate, regardless of how we resolve this litigation. Consequently, we perceive a logical distinction for excluding the Caldwell share from bearing an equal proportion of the legal fees. However, insofar as counsel for the trustee represented all the beneficiaries, and purported to protect the Caldwell share of the corpus, that share should be charged with a proportion of the trustee's counsel fees.

In view of the propriety of the standard for computing the individual counsel fees, and the amount of the total estate, which is approximately one and one-half million dollars, it is our judgment that neither the total fees assessed nor the amount assessed against the respective shares can be deemed arbitrary or excessive. Cf. *Logan* v. *Harris Trust & Savings Bank*, 8 Ill. App. 2d 61.

Under this analysis, the judgment of the Appellate Court is substantially affirmed. However, in view of our modification in the allocation of the trustee's counsel fees, the cause must be remanded to the circuit court with directions to enter a decree in accordance with the views expressed herein.

Judgment modified and affirmed and cause remanded, with directions.

APPENDIX B.

Opinion of the Illinois Appellate Court filed January 9, 1961, reported at 29 Ill. App. 2d 75, 172 N.E. 2d 413.

Presiding Justice Kiley delivered the opinion of the court.

This is a suit to construe the will of Mrs. Louisa G. Bigelow, made in Geneva, Switzerland in 1873. Her three minor granddaughters were named primary beneficiaries. In 1941 Louise de Haven, one of the granddaughters, died testate in the United States devising her interest in the Bigelow estate to plaintiff Orme. He sued for construction of the will in 1943 and in 1959 a decree was entered adverse to him. The decree allowed substantial attorneys' fees and the United States Attorney General, a substitute defendant, appealed challenging the allowances. Orme and several other parties then cross-appealed.

Mrs. Bigelow sojourned in Geneva, Switzerland from about 1871 until her death in 1873. She had made her will on May 26, 1873. Her three granddaughters, Josephine, Louise and Sarah de Haven, then eight, six and four years old respectively, resided with her and were her only heirs at law. At her death Mrs. Bigelow owned a number of parcels of Chicago real estate which she devised as part of the corpus of a testamentary trust provided for in her will. The real estate itself has been sold since the filing of the present suit, and the proceeds are trust assets. The Northern Trust Company, as successor trustee, is administering the trust.

Under the Bigelow will the trustees were directed to collect the income from the real estate, pay expenses, and pay over the residue of the income to the three granddaughters "in equal parts, individually, during their natural lives." The trust corpus was to be distributed only

on the death of all three grandchildren. Then the estate was to be divided equally among the "children or heirs" of the grandchildren, "one-third to the child or children, heir or heirs" of each grandchild.

Josephine de Haven Caldwell, the oldest grandchild, died intestate in 1919 leaving her five children as her only heirs at law. Louise de Haven married Baron Curt von Alten, a German citizen, in 1896. She had two daughters, who are German nationals. She became estranged from her family before World War I, returned to this country after the war, obtained a Nevada divorce from her German husband in 1921, in 1923 adopted Raymond Edwin de Haven and died testate in 1941. In her will she named plaintiff Orme devisee of her interest in the Bigelow estate. Sarah de Haven married Hans von Campe who died before her. She died in Switzerland in 1951, leaving three children and a will devising to her daughter, defendant Alice von Campe Lohrer, whatever interest she had under the Bigelow will.

On March 22, 1949, the Attorney General, as Successor to the Alien Property Custodian by virtue of the Trading With The Enemy Act, vested the interests of the German nationals, original defendants, including the daughters of Louise de Haven. His petition for leave to appear and defend in lieu of the German nationals was granted, and on appeal to the Supreme Court in 1952, the order of substitution was sustained. *Orme* v. *Northern Trust Co.*, 410 Ill. 354 (1951), cert. denied, *von Hardenberg* v. *McGrath*, 343 U.S. 921 (1952).

When Josephine Caldwell died her children demanded the income which had been previously paid her. The Trustee declined to accede to the demand because the Bigelow will made no express provision for disposition of the income upon the death of a granddaughter leaving issue

surviving. It provided only for disposition of income in the event of the death of a granddaughter "without issue surviving." The Caldwell children sued for construction of the will and a decree was entered granting the income to four of Josephine's children and her daughter-in-law and the latter's children. This decree is called the "1920 decree".

The pleadings in the instant case raised the issues whether the "1920 decree" was *res judicata* of Orme's suit; whether the Rule in Shelley's case applied so as to enable Louise de Haven to devise her interest to Orme; and whether Raymond de Haven qualified as a beneficiary under the Bigelow will. The issues were referred to a Master in Chancery who found that the 1920 decree "necessarily" decided the Rule in Shelley's case did not apply to vest a fee in Louise de Haven. But he also construed the will against Orme. He also found that Raymond de Haven did not qualify as a beneficiary under the Bigelow will. The Master recommended a decree accordingly. The Chancellor approved the report and decreed that the Bigelow will was valid, "capable of construction" and under it the three granddaughters of Mrs. Bigelow were given life estates with remainders to the heirs of their bodies. And the decree allowed the various parties the attorneys' fees recommended by the Master.

We shall consider the issues on appeal necessary for our decision in what we consider the most logical order.

I. RES JUDICATA.

The Caldwell decree in 1920 awarded the income from Josephine's share to her children, with the share of her son William going to his wife and children as a result of certain conveyances by William through Josephine to them.

In dictum the Chancellor sought to apply the construction with respect to Josephine's share to the interests of Louise and Sarah.

Cross-appellants Caldwells and the Attorney General contend that the "1920 decree" is *res judicata* and bars Orme's claim that the Rule in Shelley's case operated to vest a fee in Louise de Haven and that he is owner of her fee interest by virtue of the devise in her will. They say that that decree necessarily decided that the Rule in Shelley's case did not apply and that the decree settled the question of the interests of Louise and Sarah de Haven as well as that of Josephine.

We think that the 1920 decree is not *res judicata* of the issue raised by Orme. The decree does not expressly hold that the Rule in Shelley's case did not apply to Josephine Caldwell's interest nor did the dictum as to Louise and Sarah's interest mention the Rule. The decree did not find either that they took by descent through Josephine or that they took by purchase through the Bigelow will. To decide the questions before him the Chancellor in 1920 did not necessarily have to determine by which of the two alternative methods Josephine's interest passed to her children. This he carefully avoided. We agree with Orme that the 1920 decree states the result of a construction but does not state the method of construction or interpretation of the language of the will.

This conclusion on the *res judicata* issue coincides with that of three Chancellors before whom motions to strike and dismiss Orme's suit were made.

II. RULE IN SHELLEY'S CASE.

In paragraph 6th of the will, after providing life estates in the income for her three granddaughters, Mrs. Bigelow directed that no division of the corpus should be made until

the "death of all" three; then all of her property was to "be divided equally among the children or heirs of [her] grandchildren . . ., one third to the child or children, heir or heirs" of each. She went on to provide for gifts over in the event of a death "without issue."

Plaintiff Orme contends the words "children or heirs", properly construed, means heirs in the technical, legal sense and that consequently the Rule in Shelley's case operates so as to vest in Louise de Haven a fee simple interest in the Chicago real estate which she devised to him.

No Illinois case has construed the precise words "children or heirs". Plaintiff cites the Pennsylvania case of *Shapely* v. *Diehl*, 203 Pa. 566, 53 Atl. 374 (1902) wherein the words "children or heirs" were used. That case is distinguished from this because under a Pennsylvania statute fee tails merge to create a fee in the first taker. Therefore the court had only to determine that the term "children or heirs" described an estate in detail. Even if "children or heirs" was there construed to mean "issue" the Pennsylvania court could have applied the Rule in Shelley's case. In Illinois the Rule applies only when the words can be construed to mean "heirs" in the technical sense. *Hanes* v. *Central Ill. Utilities Co.*, 262 Ill. 86 (1914). The case, moreover, was not complicated by gifts over as in the Bigelow will. Finally, in the Pennsylvania case there was but one Shapely child in existence when the will was made, this "naturally suggesting the very common form of expression 'child or children'". 53 Atl. at 375. The court there, as our Supreme Court has done in *Hartwick* v. *Heberling*, 364 Ill. 523, 537 (1936), took into consideration the fact of children in existence in resolving ambiguities. It suggested that the grantor, "the thought occurring to him that there might not be any children, . . .

added 'or heirs' to complete the expression of his intent". 53 Atl. at 375. Here, however, Mrs. Bigelow's estate plan anticipates children or their lineal descendants surviving.

Where the word "heirs" is used it should be given its technical meaning unless qualified by other language which shows beyond reasonable doubt that a different meaning be given. *Kaup* v. *Weathers*, 302 Ill. 569 (1922). On the other hand " 'children' . . . does not ordinarily mean 'heirs' . . . unless the context of the will leaves no doubt of such intention." *Hanes* v. *Central Ill. Utilities Co.*, 262 Ill. 86, 89 (1914). Also, although "the word 'issue' as a general thing, means lineal descendants indefinitely, . . . whether it means descendants generally, or merely children, will depend upon the intention of the testator . . ." gleaned from the entire will. *Arnold* v. *Alden*, 173 Ill. 229, 238-39 (1898). The ordinary meaning of "issue" is "to proceed out of; offspring of a common ancestor; and includes not only a child but descendants of a child." *Miller* v. *Wick*, 311 Ill. 269, 275 (1924); *Tree* v. *Continental Ill. Nat'l Bank & Trust Co.*, 346 Ill. App. 509, 521 (1952).

The meaning of each of the words "children", "heirs", or "issue", standing alone, may be influenced by other language in a will and when used together their total meaning may be influenced by each other as well as by other language in the will. See *Porter* v. *Cutler*, 380 Ill. 215 (1942); *Noe* v. *Moseley*, 377 Ill. 152 (1941); *Hege* v. *Provident Mutual Life Ins. Co.*, 341 Ill. 559 (1930); *Patterson* v. *McCay*, 313 Ill. 491 (1924); *Kaup* v. *Weathers*, 302 Ill. 569 (1922); *Cook* v. *Sober*, 302 Ill. 498 (1922); *Lee* v. *Robertson*, 297 Ill. 321 (1921); *Sellers* v. *Rike*, 292 Ill. 468 (1920); *Stisser* v. *Stisser*, 235 Ill. 207 (1908); *Dick* v. *Ricker*, 222 Ill. 413 (1906); *Fishback* v. *Joesting*, 183 Ill. 463 (1899); *Ryan* v. *Allen*, 120 Ill. 648 (1887); *Leiter* v. *Sheppard*, 85 Ill. 242 (1877); Kales, Future Interests §§ 551-52 (2d ed. 1920).

The result of this survey indicates the wisdom of the Supreme Court's expression in *Hartwick* v. *Heberling*, 364 Ill. 523, 529 (1936): "While decisions involving wills may serve to guide this court with respect to general rules as to construction to be placed upon the will under consideration, yet unless the case be in every respect directly in point, the decision will not control but at most will only be persuasive".

The Rule in Shelley's case is not a rule of construction, but a rule of property. *Porter* v. *Cutler*, 380 Ill. 215 (1942); *Lydick* v. *Tate*, 380 Ill. 616 (1942). We must first construe the language and determine the intention of Mrs. Bigelow before turning to the question of the application of the Rule.

In paragraph 5th of the Article Second Mrs. Bigelow provides: "In case of the death of either of my said Grandchildren (without issue surviving), then the said residue of said income, is to be paid in equal parts . . . to the survivors or survivor, or their legal representatives, or heirs, . . . the one part (or half) going to one of my grandchildren or her heirs, and the other to the other or her heirs . . ." A technical meaning of "heirs" here would impute to the testator an intention to give greater benefit to the heirs of a granddaughter who survived another of the granddaughters dying without issue. For if the first granddaughter died without issue, her heirs could take nothing because of the express provisions for gift over in such case. Also, a gift over provision, in the paragraph, to the survivor in case of death of two of the Grandchildren "without issue surviving" would be inconsistent with any intention to benefit the heirs (used in a technical sense) of either of the two predeceased grandchildren. We think, therefore, in paragraph 5th "heirs" is not being used in the technical sense.

Paragraph 7th provides that "in the event of the death of all my said Grandchildren, without issue, or heirs, then the said property, real and personal" should go to the testator's "immediate heirs, and legal representatives, according to and in pursuance of the Laws of the State of Illinois". This ultimate disposition depends on the death of the three grandchildren without "heirs" as well as without "issue." It is apparent that Mrs. Bigelow distinguished between "heirs" and "immediate heirs." The phrase "immediate heirs and legal representatives under the statutes of the State of Illinois" is held to mean "heirs" in the technical sense. *People* v. *Emery*, 314 Ill. 220 (1924). If she meant "heirs" technically she could not have anticipated husbands, for husbands of the grandchildren would be their heirs. But in paragraph 6th she did anticipate husbands in the provision "that said property, real and personal, shall remain intact free from the husbands or husband of any or either. . . ." She could not reasonably have meant that if the grandchildren died not having children but having husbands the gift over would not take place. She consistently tried to keep her property from anyone except the grandchildren and their children or lineal descendants.

We disagree with Orme that the exclusion of husbands in paragraph 6th pertains to life estates "of necessity." Mrs. Bigelow expressly provided to keep "intact, free from the husbands," property, "real and personal." This would include corpus and income.

In paragraph 6th provision is made for a life estate to each of the three granddaughters, with remainder interests upon the death of the last survivor to go to their "children or heirs". If one of the granddaughters should die "without issue", then the property was to be "apportioned to the issue, heir or heirs" of the two surviving

grandchildren. Construing "heirs" in the technical sense would give to the heirs of a survivor and deprive the heirs of the decedent, when Mrs. Bigelow's evident affection for them does not warrant that discrimination. Furthermore, Mrs. Bigelow expressed the desire to exclude husbands and repeats that after the death of each grandchild the property be divided "among their issue as hereinbefore specified". The specification was in paragraph 5th where she already used the word "heirs" and where, as we conclude hereinafter, "issue" could not mean "heirs", and "heirs" must mean "issue".

Plaintiff concedes the words "issue as hereinbefore specified" in paragraph 6th are inconsistent with the previous "children or heirs", and that either "heirs" or "issue" was used inadvertently. And we are not pursuaded by him that the broader word "heirs" takes into itself the meaning of "issue" when used together. The two words are not always linked together in the will and not always the same way; and the super-added word is "heirs", *i.e.*, "children or heirs" not "heirs or children", and "issue or heirs" not "heirs or issue".

The Master found that in paragraph 6th "without issue" clearly indicates no intention of indefinite succession and negates the idea of "heir" technically, because there would be no gift over after the previous death of other grandchildren if "heirs" meant heirs generally. In *Hartwick* v. *Heberling*, 364 Ill. 523 (1936), gifts over were shown to be a factor and the Master was justified in considering the gift over in determining what the testator meant by the ambiguous language.

We are of the opinion that Mrs. Bigelow intended "issue" by the word "children or heirs" and that, therefore, the Rule in *Shelley's* case does not apply. We agree with the construction by the Master and confirmed by the

Chancellor; *i.e.*, Mrs. Bigelow "by her said Will gave equitable life estates to her three granddaughters therein named . . . but did not give any equitable remainder to vest . . . in the heirs at law of such granddaughters, and therefore . . . the Rule in *Shelley's* case is not applicable.

This conclusion makes it unnecessary to consider other reasons why the Rule in *Shelley's* case should not apply.

III. THE CALDWELL MOTIONS

We disagree that the Caldwell motion to dismiss should have been sustained. We have approved the Chancellor's finding that Orme's suit presented an ambiguity needing construction and the finding that the Rule in *Shelley's* case did not apply. We have decided the "1920 decree" is not *res judicata*. And we see no basis for a claim of laches since Louise de Haven died in 1941 and Orme sued in 1943.

As to the motion for judgment on the pleadings, we agree with the Chancellor that the decree protected the interests of the Caldwells which their motion was designed to protect and "no purpose" would be served by passing on the motion.

IV. RAYMOND DE HAVEN ADOPTION

Raymond de Haven contends that by reason of his adoption by Louise de Haven he qualifies to take under the gift, in the Bigelow will, to the "child or children, heir or heirs" of Mrs. Bigelow's granddaughters.

The decree found that "De Haven is not a member of this class [issue of the body] and has no interest in any of the trust property. . . ."

De Haven relies upon the "modern view" which accords adopted children a status of inheritance equivalent to that of natural children. As evidence of the trend he cites *In re Stanford's Estate*, 49 Cal. 2d 120, 315 P. 2d 681

(1957); *In re Heard's Estate*, 49 Cal. 2d 514, 319 P. 2d 637 (1957); *Edmands* v. *Tice*, 324 S.W. 2d 491 (Ky. 1958); *Hayes* v. *St. Louis Union Trust Co.*, 280 S.W. 2d 649 (Mo. 1955).

Our legislature seems to have taken a step toward the "modern view" in its recent amendments to the Administration of Estate and Adoption Acts. However, the amendments are prospective in application and the law in effect when the Bigelow will was made and at the death of the testator in 1873 controls the question before us. Under the law prior to the recent amendments, the word "issue" would not include an adopted child unless the language of the will clearly shows the intention, or the language and surrounding circumstances if necessary to go beyond the language. *Stewart* v. *Lafferty*, 12 Ill. 2d 224 (1957).

When the will was made the granddaughters were small children. It is highly unlikely that Mrs. Bigelow had in mind when she made the will the probability of great grandchildren by adoption. We hold that Raymond de Haven, as an adoptee of Louise de Haven, does not qualify to take under the Bigelow will.

V. FEES

We think the Chancellor was justified in finding that plaintiff's suit presented ambiguities in the will which required construction and we have agreed with that construction. A reasonable allowance of fees was, therefore, proper.

The trust is chargeable with the reasonable fees of attorneys for plaintiff or any defendant or cross complainant having an interest in the construction of the will. *Brumsey* v. *Brumsey*, 351 Ill. 414, 427 (1933); *Dean* v. *Northern Trust Co.*, 266 Ill. 205, 211 (1914). The question in the

cases is whether there is an honest difference of opinion as to the proper construction. *Strickland* v. *Strickland*, 271 Ill. 614, 621 (1916). And an adverse ruling does not preclude application of the rule. *Cravens* v. *Haas*, 318 Ill. App. 447 (1943).

The Attorney General contends that the Master applied inappropriate standards which he improperly applied in favor of persons having no substantial interest in the suit; did not confine compensation to the services on the will construction issue; and that payment for duplicate services was error.

The Master and Chancellor adopted a cover-all rate of $25.00 per hour for legal services, for the reasons that:

A. Where fees are paid out of a fund, a more conservative rate is adopted than is customarily used for an attorney and client who have freely agreed upon compensation.

B. That commonly, the compensation of a judge in the test applied in situations like the one before us.

There was added to the rate earned by judges an allowance for overhead which lawyers have and judges do not. This matter was discretionary with the Chancellor and we are not persuaded that he abused his discretion in adopting this rate.

The Attorney General complains "that despite the fact that the Master recommended that virtually all of the services of plaintiff's counsel were compensable he employed different standards in setting fees for the other parties." He argues that "in some cases only those services connected with the problems raised on construction were held

compensable and this . . . was based upon considered guesses." For example, the Master accepted the 40% factor for computing time devoted to construction by the Attorney General, but a 50% factor was used to evaluate time spent by the Caldwells' attorneys "and this despite the fact that that firm stood on their motions for judgment on the pleadings and refused to participate in the hearings on the merits." He does not complain that his compensation was based on actual costs of the services to the government rather than on the rates set by the Chancellor.

We do not think that the Chancellor abused his discretion in this matter since the forty per cent ruling was based on the Attorney General's own estimate and the fifty per cent figure was based upon the Master's view of the "divisions of their brief." There were allowances for some duplication of services, but the unique nature of this litigation and its multiplicity of pleadings covering interests of various parties over a long period of time would normally result in some duplication. We see no error in these matters.

Plaintiff's attorneys claimed $112,880.00 for 3,643 hours work and were allowed $89,550.00. The Attorney General contends the allowance should not have exceeded $36,000.00. We have examined the schedules filed in support of the claim and see no reason to upset the allowance. The rendering of services began in 1942 and the nature of the controversy precluded a narrow limitation of services on the will itself. This is not the usual will construction case.

The Trustee requested $105,000.00 and was allowed $84,712.50 for fees for services beginning in 1943. It does not complain about the finding as to the time expended but about the insufficiency of the rate in view of the excellence of its attorneys. There is no showing that the Chancellor should have made a distinction between the skills of the attorneys rendering services for the various parties.

A question is raised about the fee allowance for de Haven's attorneys. Whether de Haven was a child or heir was a relevant point at the hearing. It was of substantial interest, and he was a proper party. The decree permanently removed his claim from the Bigelow will controversy and to that extent aided all having interests. Furthermore, de Haven was interested in defending because if Orme prevailed de Haven's claim would fail. Being drawn into the case, de Haven engaged attorneys who contributed to the solution of the ambiguity in the Bigelow will so far as it related to him.

The Master disallowed time spent by de Haven's attorneys in defending the issue raised by the Attorney General as to the validity of the adoption. We think this was error. He was allowed $6,035.00 for services on his right to take under the Bigelow will. Defense of his adoption was a necessary prerequisite to these services. De Haven's attorneys were entitled to an additional sum of $1,625.00 for 65 hours at $25.00 per hour and $1,530.00 for 102 hours at $15.00 per hour for a total of $3,155.00 additional allowance.

Attorneys for the Caldwell interests who entered the case in 1946 were allowed fees of $1,875.00. No fees were allowed the original attorneys who "made no contribution or any aid on the construction problem." The Caldwell defendants had an interest in protecting themselves against an adverse interpretation of the 1920 decree in order to avoid a possible tax liability and in protecting their share from the total fee allowances. If the court held that the Caldwell interest was taken by descent rather than by purchase under the trust, they "would then be thirty-nine years late in filing Federal Estate and State Inheritance Tax returns, and the tax, and interest and penalties, could wipe out completely [their] remaining distributive share of this trust."

The attorneys for Alice Lohrer and Kraft Administrator were allowed $9,102.50. Their services rendered on tax problems were excluded, but services rendered in defining their interests in the trust estate, were included. The attorneys for the Sarah von Campe interests were allowed $700.00 by the Master "without insisting on detail" but, appropriately, no fees were allowed for work on the Rule Against Perpetuities question.

The decree allowed the attorney for certain German nationals $7,500.00 for fees and $332.86 for costs and expenses prior to the order substituting the Attorney General in 1949. Fees were denied for any services rendered after the 1949 vesting of the Attorney General. Complaint is made of this disallowance.

The Attorney General's vesting order was made in March 1949. In November 1950 the appearance of the German nationals was struck and the Attorney General substituted in their stead. They appealed to the Supreme Court of Illinois, raising contentions similar to those raised now on appeal of the vesting order. The order was affirmed. *Orme* v. *Northern Trust Co.*, 410 Ill. 354 (1951). The Supreme Court denied a petition for certiorari. *Von Hardenberg* v. *McGrath*, 343 U.S. 921 (1952). The Illinois Supreme Court decision is res judicata of the questions raised by the German nationals on this appeal. That opinion was expressly made "without prejudice" to possible future litigation seeking "revesting". That has no bearing in this litigation.

The interests of the German nationals was not freed under General License 94. That License applied to interests acquired after January 1, 1947 and the interests here in question concededly came into existence, at the latest, upon the death of their mother, the life tenant, in

1941. The Supreme Court in *Helvering* v. *San Joaquin Co.*, 297 U.S. 496 (1936), interpreted the word "acquire" within the contemplation of the revenue acts in the manner contended for by the German nationals, but, in contemplation of the purpose of the Trading With The Enemy Act, we think our conclusion as to the acquisition is right.

The order vesting the Attorney General with the interests of the German nationals on March 29, 1949, divested them of their interests in the trust property. *Cummings* v. *Deutsche Bank*, 300 U.S. 115, 121 (1937). After that date they no longer had an interest in the trust and were no longer proper parties to the suit. We conclude the Chancellor correctly limited compensable services to the period before the vesting order.

When plaintiff began this suit the German nationals and Mrs. von Schiller had interests under the will and were named defendants. Their interests were then being challenged by Orme's suit and they aided the court's construction. We see no reason to interfere with the Chancellor's allowances and disallowances with respect to the interests of the German nationals and Mrs. von Schiller.

We will not discuss other allowances made by the Chancellor, but to which no objection was made on this appeal which has not already been answered with respect to other parties.

We have found that the allowances to the individual attorneys were not unreasonable. We are unable to say, therefore, that the total allowance of $221,901.33, which includes the additional sum for de Haven, out of the shares of the estate valued at about one and one-half million dollars is unreasonable. In *Logan* v. *Harris Trust & Savings Bank*, 8 Ill. App. 2d 61 (1955), 23% of a $65,000 estate

was held excessive. Here the allowance is about 14% of an estate of one and one-half million. Also, the case here is unique in its history and facts.

Justice McSurely said in *Continental Ill. Nat'l Bank & Trust Co.* v. *Hardeen*, 306 Ill. App. 123, 131 (1940), "while, possibly, we might not agree as to every item, we see no reason to conclude that the allowances were unreasonable." That is our view here. The Chancellor has had long and broad experience and was acquainted with the character and amount of the services rendered in this litigation.

It was not error to charge the expense of this suit against the share of Louise de Haven and Sarah von Campe only. The various interests involved in the share of Josephine Caldwell were not involved in this suit and it would have been unjust to tax that share with the costs of litigation which concerned the other two shares. The instant suit was, however, indirectly an attack upon the 1920 decree which settled the questions of the Caldwell share of the Bigelow estate. For this reason, we agree with the Chancellor that the Caldwell defendants "were forced . . . in . . . here without choice and should not be burdened with the costs and expenses thus far." We agree with the Chancellor that part of the Trustee's fees were chargeable against the Caldwells.

We think, too, that the court properly allowed fees to be charged against the Sarah von Campe share of the trust estate. This suit was directed at the interest of the Louise de Haven share, but the construction of the will in the decree settled definitively for the first time the interest of Sarah von Campe and her daughter, Alice Lohrer, as

well as that of the Louise de Haven share. That the suit was a matter of concern to them is indicated by Alice Lohrer's adoption of the arguments in the brief submitted on behalf of the Caldwell interests, of the trustee and of the Attorney General. The share of Sarah von Campe was "in question" when the will was construed and we can see no abuse of discretion in the Chancellor's charging that share with one-half of the expenses of the construction.

The services rendered in behalf of Raymond de Haven's claim, and for defense of his adoption, however, had nothing to do with the Sarah von Campe share. The fees for those services should have been charged against the Louise de Haven share.

We approve the decree except as to the disallowances of fees to the attorneys for Raymond de Haven for services in defending the adoption decree. We are modifying the decree by adding the amount of $3,155.00 to that allowance, and by assessing all the fees allowed Raymond de Haven against the Louise de Haven share.

For the reasons given, the decree, as modified is affirmed.

Affirmed as Modified

Burman and Murphy, JJ., Concur

APPENDIX C.

Order entered by Supreme Court of Illinois July 13, 1962 (R. 41):

On motion of appellants Adelheit von Hardenberg, Irmgard von Alten and Irmgard von Schiller,

It Is Ordered that the mandate in this case is stayed until the Supreme Court of the United States makes a final disposition of the petition for want of certiorari of said appellants, insofar as the mandate affirms that portion of the decree appealed from which directs the trustee to distribute one-third of the assets of the trust created by the last will and testament of Louisa G. Bigelow to the Attorney General of the United States by reason of the vesting orders issued under the Trading With The Enemy Act, rather than to said appellants. This order shall not delay payment by the trustee of expenses of administration of said trust, or of expenses and attorneys' fees in connection with this litigation, from the aforesaid one-third of said trust which is in dispute between said appellants and the Attorney General of the United States.

APPENDIX D

Excerpt from decree of Circuit Court of Cook County, entered March 2, 1959 (Pet. A. 13-18):

4. Upon the death on December 12, 1941 of Louise de Haven (who is the granddaughter of Louisa G. Bigelow named in her said Will as Augusta L. De-Haven and in the 1920 decree in the Caldwell suit as Augusta L. von Alten) the equitable interest in that undivided part (one-third) of the entire trust estate in which said Louise was given by the terms of the Will a life interest came into possession and enjoyment (subject always to the trusteeship until the death of the last survivor of the aforesaid three named grandchildren of Louisa G. Bigelow, deceased) of her two children, namely, the former defendants Adelheit (Adelaide) Augusta Nina Edwina (von Alten) von Hardenberg and Erma (Irmgard) Stella (von Alten) von Wengerskey (who were originally parties defendant to this cause, but dismissed from this cause by order entered herein on November 9, 1950 wherein, by reason of vesting orders referred to in said order and in the Master's Report, the Attorney General of the United States of America was substituted for them in this cause), the only children ever born to said Louise de Haven, in the share and proportion of one-half to each of said children, and that in and by the proper construction of the Will of Louisa G. Bigelow as therein expressed said interests of the aforesaid children of Louise de Haven were equitable, but present, vested, absolute, and in fee in the aforesaid trust estate and were also indefeasible and not subject to be divested by any gift or gifts over whatsoever, created in and by said Will of Louisa G. Bigelow, deceased; that by virtue of the vesting orders

set forth in the answer and counterclaim of the Attorney General of the United States of America and the Trading with the Enemy Act, as amended, and Executive Order 9095 and the vesting orders and executive orders referred to in said Master's Report and in said order, the interests of each of said two children, including all income accrued since the death of Louise de Haven, their mother, vested and is now vested in the defendant and counterclaimant the Attorney General of United States of America for the purposes and subject to the provisions of the Trading with the Enemy Act, as amended, and the executive orders issued pursuant thereto, and upon the death of Sarah de Haven said interests (principal and accumulated undistributed income) became distributable to the Attorney General of the United States of America to be held and disposed of for the purposes and subject to the provisions of the Trading with the Enemy Act, as amended, and the executive orders issued pursuant thereto, but the Trustee was prevented from making distribution thereof pending the entry of the final decree in this cause and shall make distribution upon entry of and in accordance with a final decree or decrees in the Biddle suit in the amounts as shall be finally determined in and by such decree or decrees and upon determination of the validity, amount and rank of liens, if any, which have been asserted and remain unsatisfied against said interests in said Biddle suit, as shall be finally determined in and by such decree or decrees therein, and upon approval of the Trustee's final account therein.

5. Upon the death, on February 4, 1951, of Sarah de Haven (being the granddaughter of Louise G. Bigelow sometimes known and named in the said Will of

Louisa G. Bigelow as Sarah E. de Haven and being the same person as Sarah E. von Campe named in the 1920 decree in the Caldwell suit) the trust under article Second of the Last Will and Testament of Louisa G. Bigelow, deceased, terminated and the equitable interest in that undivided part (one-third) of the entire trust estate in which the said Sarah was given by the terms of the said Will a life interest, came in the possession and enjoyment of her three children, namely, the defendant Alice Lohrer (who is the same person as Alice von Campe von Hardenberg named in said 1920 decree in the Caldwell suit, and who was sometimes known as Alice Clara Hedwig Marie von Campe von Hardenberg), the defendant Edwin von Campe (who is the same person named as Edwin von Campe in said 1920 decree in the Caldwell suit, and who was sometimes known as Edwin Gotthardt Edmund Hans van Campe) and the former defendant Otto von Campe (who is the same person named as Otto von Campe in said 1920 decree in the Caldwell suit and was sometimes known as Otto Joseph Carl Herman von Campe), in equal shares of one-third each (one-ninth of the entire trust estate); that by virtue of the vesting orders set forth in the answer and counterclaim of the Attorney General of the United States of America and the Trading with the Enemy Act, as amended, and Executive Order 9095 and the vesting orders and executive orders referred to in the Master's Report the interest of said Otto von Campe vested and is now vested in the defendant and counterclaimant the Attorney General of the United States of America for the purpose of and subject to the Trading with the Enemy Act, as amended, and the executive orders entered pursuant thereto, and

that from and after the death of Sarah de Haven the Attorney General of the United States of America became entitled to share in the net income subject to distribution by the Trustee out of the trust estate distributable on the termination of said trust in the proportion of one-third of the portion which said Sarah de Haven was entitled to during her lifetime (one-ninth of the entire trust estate.) The interests of the aforesaid two children of Sarah de Haven (Alice Lohrer and Edwin von Campe) and of the Attorney General of the United States of America are present, vested, absolute and in fee and not subject to be divested by any gift or gifts over whatsoever, created in and by the Will of Louisa G. Bigelow, and upon the death of Sarah de Haven said interests (principal and accumulated undistributed income) became distributable to said defendants Alice Lohrer, Edwin von Campe and the defendant and counterclaimant, the Attorney General of the United States of America, the portion distributable to the Attorney General of the United States of America to be held and distributed for the purposes and subject to the provisions of the Trading with the Enemy Act, as amended, and the executive orders issued pursuant thereto, but the Trustee was prevented from making distribution of said shares pending the entry of the final decree in this cause, and shall make distribution upon entry of and in accordance with a final decree or decrees in the Biddle suit in the amounts as shall be finally determined in and by such decree and upon determination of the validity, amount and rank of liens, if any, which have been asserted and remain unsatisfied against said interests in said Biddle suit as shall be finally determined in and by such decree or decrees therein and upon approval of the Trustee's final accounts therein.